

IN THE LABOUR COURT OF SOUTH AFRICA  
(Held at Durban)

Case No: D495/08  
Not reportable

In the matter between-

NATIONAL UNION OF METALWORKERS  
OF SOUTH AFRICA

First Applicant

ERIC MAVIYO NXUMALO & 41 OTHERS

Second to Further Applicants

and

DURBAN GALVANISING (PTY) LTD

Respondent

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Judgment

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**Cele J.**

**Introduction**

- [1] The claim of the applicants is based on their allegation that they were unfairly dismissed by the respondent while they or some of them embarked on an unprotected strike. They maintained that the respondent had no legal bases to dismiss them and that the dismissal was procedurally and substantively unfair. They seek the primary relief of reinstatement with full benefits on the same terms and conditions of employment as were previously applicable. The respondent

opposed the claim by maintaining that the dismissal of the employees was based on their failure to report for duty and that they were therefore not entitled to any relief. Parties are in dispute on a number of facts. The facts of this matter that are germane in the resolution of the dispute which come across as not disputed will be dealt with as background facts.

**Background facts.**

- [2] The respondent is a company that specialised in hot dip galvanising and general engineering work, with its principal place of business in Durban North. It operated a split shift system in terms of which the first shift commenced work at 07h00 till 16h00. The second shift commenced at 17h00 till 03h30. One or two people are then used to keep continuity of the business in between the two shifts. At the end of the night shift, workers stay in the plant until the morning where after they catch a bus to their places. Mr. John Fischer was its Managing Director duly assisted by the Production Manager Mr. Roy Ramadu. The second to further applicants (hereafter referred to also as employees) were in the employ of the respondent, having commenced such employment at various time intervals. They were members of the first applicant, a trade union duly (hereafter referred to also as the union) acting in this matter in its own interest and on behalf of the second to further applicants.
- [3] During 2006 the respondent sourced some of its employees from an entity then known as the Workforce Labour Broker. These employees had to resign from the Workforce so as to join the respondent. There is a dispute, not to be resolved in this matter, whether the respondent promised them employment on a full time basis or a fixed term employment. They were employed on a fixed term three months contract renewable from time to time. The respondent took the position that it operated a just in time business, with the demand on its services fluctuating from time to time. It chose to keep a work force that was flexible. To achieve this end, it operated a permanent work force that worked on a

continuous basis (the permanent employees) and also a permanent pool of contract employees who worked whenever the demand for its product required their services (the temporary employees).

- [4] In 2008 the temporary employees had occasions to work on sporadic days and the permanent employees had occasion to work overtime. There is a dispute between the parties on why this occurred. The issue is not for a resolution in these proceedings. On 17 April 2008 the respondent terminated the services of either three or five of the temporary employees. According to the respondent, the fixed term contracts of those employees came to an end through the effluxion of time. The union took the termination of services as a dismissal. The union says that the respondent thereafter employed other new contract employees and also introduced one hour overtime a day for the permanent employee. These allegations are denied by the respondent. However, it subsequently came to light to the company that it acted contrary to the main agreement, regulating the industry, in the manner it employed the temporary employees. An arbitration award had been issued against the company and in favour of two of such erstwhile employees. The company thus conceded that it had acted irregularly in respect of the employment of the temporary employees, the very issue that brought about the unprotected strike.
- [5] On Friday 18 April 2008, the shop stewards of the company proposed to Mr. Ramadu that a meeting be held with the company management to discuss the the alleged unfair dismissal of the temporary employees. They were told that Mr. Fischer was not immediately available until the next Monday, 21 April 2008.
- [6] In the morning of Monday 21 April 2008, the day shift employees clocked in for work but went to gather at the change room. Mr. Ramadu called the shop stewards and two other employees, regarded as 'elders' to the office of Mr. Fischer, who had also arrived at the premises. Mr. Fischer enquired about the concerns of his employees from their representatives. What he said and how it

was said is part of the disputed facts. Mr. Fischer told the employees' representatives that another competitor in that industry, Phoenix Galvanising, would be closing down soon and that workers were to be told to return to work or to leave the company premises.

- [7] The representatives went to the employees to convey the message and the employees opted to leave the premises and not to resume work. In the meantime, Mr. Fischer contacted the bargaining council of that industry and it was confirmed that the withdrawal of labour was in the circumstances an unprotected strike and that Mr. Fischer had to issue an ultimatum for them. He prepared one such ultimatum. It called on the employees to resume work before 12h00. At about 09h30 Mr. V. Shezi, a union official, arrived at the company premises. He went to meet Mr. Fischer at his office. The shop stewards were also present. No meaningful discussion took place between Messrs Shezi and Fischer over the events that had ensued. Mr. Shezi and the shop stewards soon left the office, taking with them the issued memorandum. The workers also left the change room and they proceeded towards the receiving gate in the process of leaving the company premises. Mr. Fischer gave an instruction for the gates to be closed. They were closed to keep the employees outside of the company premises. One of the security officers regularly deployed at the respondent and who was on duty on 21 to 22 April 2008 was Mr. Alfred Ntiyantiya.
- [8] At about 10h15 the respondent deployed two armed security guards from Combat Security Company and placed them at each gate. At about 14h00 Mr. Fischer emerged from his office and proceeded to the employees who were gathered outside, opposite the dispatch gate of the company premises. He spoke to the shop stewards. What he said is part of the bone of contention. He however did call one of the striking employees, Mr. James Nxumalo and told him to advise the night shift employees not to report for duty at 17h00 of that day but instead to report at 07h00 of the next day, 22 April 2008. The striking employees then left for their homes on that day.

- [9] On 22 April 2008 no work was done by the night shift employees who had to be told to report at 07h00. The employees gathered at the gate. At some stage Mr. Fischer emerged from his office with a batch of payslips which he distributed to the employees. He returned to his office only to emerged again a little later with more payslips for the employees who were to have worked on the night shift on 21 April 2008 but were told to report on the next morning. A maximum of R490.00 was deducted from the remuneration of each employee for overalls and safety clothes. The respondent had dismissed its day and night shift employees. An unfair dismissal dispute arose between the parties which the union referred to the Commission for Conciliation, Mediation and Arbitration for conciliation. The dispute was not capable of a resolution and it was referred to this court by means of the statement of case.

### **The issue**

- [10] It remained beyond doubt that the respondent dismissed its employees, the second to further applicants. The question is whether such a dismissal was based on a fair reason and whether it was carried out in a fair manner. If the dismissal is found to have been unfair, the next question is whether or not the employees are entitled to be reinstated. The respondent had to prove the fairness of such a dismissal. At the commencement of the trial, parties agreed between themselves that:
- the twenty persons who are named in the schedule which has been added to the bundle of pleadings, as page number 41, were employed by the respondent in its day shift and were dismissed by it;
  - the eleven persons whose names appear in the schedule which has been added to the pleadings bundle, as page 42, were also employed by the respondent in its night shift and were dismissed by it.

- the said persons are the second to the thirty-second applicants.  
The day shift employees had taken part in an unprotected strike at their place of employment on 21 April 2008.

### **Respondent's case**

- [11] The respondent called and led the evidence of three witnesses, Mr. Fischer, Mr. Ramadu and Mr. Alfred Ntiyantiya, a security guard employed, at the time, by Bambizandla Security Services. The case of the respondent in addition to the common cause facts will now be outlined hereafter.
- [12] On 17 – 18 April 2008 the company was having three to five temporary employees who had been working on a contract to ease work of a particular customer. Their contract had come to an end. The company thought of keeping them to see if work would improve. It did not. They were called on a Friday and were paid out and were told to leave. On that Friday morning, of 18 April 2008, some of the shop stewards approached Mr. Ramadu and told him that workers had heard about the dismissal of the temporary staff and they were not happy. Mr. Ramadu told them that he had no authority to keep them as their contract had run its course. He would however tell Mr. Fischer about the concerns and that shop steward had to return to work as the matter would be discussed on Monday.
- [13] On Monday morning of 21 April 2008 the shop stewards came to Mr. Ramadu at about 06h00 to 06h15 and told him that workers were not prepared to start work on that day before they had an answer on the issue of the dismissed employees. The majority of the night shift workers of the previous night, 14 of the 18, were also present. Mr. Ramadu telephoned Mr. Fischer, reported that the employees needed to talk to him regarding the four employees whose services had been

terminated. On the previous Friday Mr. Ramadu had not arranged any specific time for the meeting.

- [14] Mr. Fischer arrived at the premises about 20 minutes later but avoided to go straight to the change room to be confronted by workers. Mr. Ramadu reported to him what was happening. He told Mr. Ramadu to call the two shop stewards and some elders (these are employees with lengthy service of about 20 years with the respondent). A discussion was held with them in which he said that the contracts of the temporary staff had run out and he would not prefer to put permanent workers on short time so as to keep the temporary staff. He told them that they were embarking in an unprotected work stoppage and that they had to tell others to go back to work. He said that he was moving on in life. If the strike continued, he would close the company and go abroad to retire there. He denied a suggestion that he had said that he would just close down the company anytime and leave this country to go and retire lavishly abroad with many servants to attend to him. He denied that he had made any reference to the current and past Presidents of South Africa having messed up this country. He denied that he had refused to discuss any grievances with the employees' representatives. He denied having told one of the shop stewards, Mr. Christopher Cele, to open his business as he was clever but said that he told him to open his own business if he should make all the decisions as he did. He told the shop stewards to tell workers to treasure their work as times were difficult and Phoenix Galvanizing, a competing company was closing down. That he said he would take over their employees, as suggested to him, was not true.
- [15] According to Mr. Ramadu there were no negotiations in that meeting. Mr. Fischer spoke and just told the representatives to go to the change room to report to the rest of the employees. Also, according to Mr. Ramadu there was a clear understanding on Friday that there would be a meeting on Monday 21 April 2008, hence the convergence of the day and night shift employees in the change room on that Monday morning. The meeting was to have been before the start of the

day shift. According to him, the strike therefore commenced as workers left the change room.

- [16] Mr. Fischer could not remember if he had told the shop stewards to tell workers to go back to work while he would be investigating their grievance. They then left him and proceeded to the change room. Some time went on without workers coming down to work and thereafter workers left the change room and exited through the gate. It was by then about 08h30 to 09h00. Mr. Fischer went to his office from which he telephoned the bargaining council which advised him to issue an ultimatum of 2 hours to the workers. He had the ultimatum typed. It gave workers up to 12h00 to return to work. He went to the gate where he gave copies of it to the shop stewards to distribute to workers and he returned to his office.
- [17] Mr. Shezi then arrived with some shop stewards at Mr. Fischer's office and Mr. Fischer asked what he was doing there. Mr. Fischer gave him a copy of the ultimatum, telling him to go and counsel the workers so as to return to work, thereafter slamming the door on his face. There was an incident in 2005 when employees embarked on an unprotected strike. Mr. Shezi came to the company and said that workers had done wrong and they wanted to resume work on the following morning. The company agreed then to take them back and the unprotected strike ended after his intervention.
- [18] From his office, Mr. Fischer could see two company gates, the dispatch and the entrance gates. He had instructed the security guard at the dispatch gate to keep it closed and locked but had said that the entrance gate was to remain closed but not locked so that customers could use it, otherwise the company stood to lose its customers. An armed guard manned it. Those who were not on strike feared for their lives and they included Mr. Fischer's children who worked for the company. Two workers, Messrs James Zuma and Christopher Zuma came through the entrance gate at some stage in pretence of going to the toilet or to drink water, but came to intimidate two employees, Messrs Thokozani Dayi and

Alfred Roleti who were working at the time. Mr. Dayi ignored them while Mr. Roleti succumbed to the threat and left work.

[19] At about 12h00 Mr. Fischer went through the gate to the group of the workers, where he called the shop stewards and asked if a decision had been made to return to work. He said that he was old and wanted to retire and so could close the company. No answer was given to him. He could not remember if Mr. Shezi was also at the gate. He then went back to his office. Any employee who wanted to return to work could do so as the entrance gate was closed but not locked. The striking employees knew that and Mr. Shezi and the shop stewards had used it to go out. It could therefore not be true that striking employees wanted to return to work but were prevented by the locked gates. The union could have used a fax or a cellular telephone if they wanted to communicate an intention to return to work as they had done later when they were condemning the actions of the company. If any of the workers wanted to return to work, they could have told the guards at the gates and Mr. Fischer could have been called to the gate to attend to that. According to Mr. Ntiyantiya the security guards did not have any permission to allow any of the striking workers access into the company premises. He however allowed the employees who said they wanted to come in to drink water. On 22 April 2008 there is an employee who wanted to come in but was disallowed by other security guards at gate one. That employee was sent to him. He then went to Mr. Ramadu to ask if he could allow that employee in. Mr. Ramadu agree and the employee was allowed in. That person was however not Mr. Petros Khathi who was identified in court.

[20] At about 14h00 Mr. Fischer returned to the gate. He called the shop stewards and the elders. A number of workers had then left for their homes, which included most of the night shift workers. He told them to indicate what they wanted to do and said that he might be closing the company down. Nobody responded. He went back to the office and directed that pay outs were to be prepared for the

striking day shift employees. Pay pockets were prepared and given to the striking employees. Nobody came to work on Monday night.

- [21] On Tuesday morning of 22 April 2008, the night shift who had to resume work did not turn up for work, with the exception of two people known as Thokozani and John, the electrician. A group of employees arrived and stood across the road. Pay pockets were issued for the night shift employees and none of them said that they wanted to come back to work.
- [22] The company then engaged the services of temporary employees. Some of the dismissed employees returned to work one by one but were not taken back immediately. As to the re-instatement of the applicants, the economy has taken a nose dive. The completion of the FIFA World Cup works has also contributed to its financial difficulties. This has resulted in the company having an overdraft of about R1,8 million. In the last three months, Mr. Fischer took R1 million from his private banking for use by the company, otherwise the company would be technically insolvent. The bank considered his personal security for company overdraft purposes. In a galvanizing industry a substantial tonnage has to be made to make a profit. Up to 400 tons of the product is to be made but the company was barely making at the time. The company has a huge zinc pot it always has to keep on, whether there are customers or not and the company pays for electricity to keep the pot on. In the last December the company made a loss because of the holidays. The positions vacated because of the dismissals had to be filled by trained employees that had to be engaged. The company will not be able to afford a back pay with interest for the dismissed employees. Instead the company would have to close down. Reinstatement will therefore not be possible.

**Applicants' case**

- [23] The applicants' version was presented by and is reliant on the evidence of Mr. Cyprian Mavuyo Nxumalo as the only witness called. He was an employee of the respondent and was one of the shop stewards representing union members. Employees had a problem with the termination of employment of the fixed term contracts because:
- the respondent had not discussed it with the shop stewards;
  - the dismissed employees had not been issued with a warning;
  - there had been an altercation between a Black employee and a White employee. The former was dismissed without a hearing and the latter was not dismissed;
  - the employees had not been provided with a first aid kit.
- [24] In relation to the fixed term contracts the employees were never given an opportunity to read it. They would just be told to sign it. The shop stewards were not happy with the use of the fixed term contracts because:
- the employees involved were not allowed to take a sick leave;
  - an employee who took sick leave would not be paid for that day;
  - the employees were forced to work overtime.
- [25] On Friday, 18 April 2008 an arrangement was made with Mr. Ramadu that there would be a meeting in the morning of Monday with Mr. Fischer who had not been at work on Friday. After the meeting employees would then commence work. There were arrangements made with the night shift worker to stay back for the meeting. On Monday, Mr. Nxumalo arrived at work at about 06h15. The employees then commenced with a meeting but at about 06h50 Mr. Ramadu came to the change room where the meeting was held and reported that Mr. Fischer had arrived and that 2 shop stewards and elders, whom he identified, were to go down to meet him. Three shop stewards and three elders came forward for the meeting. The rest of the employees were told by Mr. Ramadu to

sit and to wait for the report from the shop stewards after the meeting. Mr. Nxumalo was one of the shop stewards that then proceeded to the meeting at about 06h55 and by then there was no industrial action. The applicants' statement of case states though in paragraph 14 that whilst a meeting was taking place with Mr. Fischer in the morning of 21 April 2008, the remainder of the workforce embarked upon a strike whilst awaiting the outcome of the meeting.

[26] The meeting with Mr. Fischer commenced by him asking what they wanted to talk about. Mr. Nxumalo produced a letter, as an agenda for the meeting which the employees had drawn in their earlier meeting. Mr. Fischer refused to accept the letter, saying he did not work in that manner, saying it in an unfriendly manner. Mr. Fischer did not give anybody a chance to speak. Instead he spoke about his power and money, saying he was old and could sell the company as it was, go to retirement abroad and that the employees had no say in it. He said that this country had been messed up by people such as the present and the previous Presidents. He referred to a competing galvanizing company in Phoenix, saying it was closing down and he would recruit its employees in the place of his employees. He pointed at one of the shop stewards whom he said he thought himself to be clever, saying he was to go and open his company. In that encounter, no attempt was made by Mr. Fischer to meet any grievances of the employees. The meeting took about five minutes and Mr. Fischer told them to go and tell the employees if they did not want to work they were to leave his firm.

[27] The representatives left the meeting to report back. They told the employees what had been told to them. The employees decided to leave the company premises as advised by Mr. Fischer. It was then about 07h15 to 07h20. As the workers were leaving the premises, Mr. Fischer said he would call armed security guards with dogs who would come and shoot the workers. Workers went to stand outside of the company premises and as they did so, some armed security guards arrived at the company premises and went guard. Later members of the South Africa Police Services (SAPS) arrived at the company. Yet there was no

violence by the strikers. The incident of a damaged intercom of the property across the company was unknown until the union received a letter about it.

- [28] At about 09h30 Mr. Fischer called the shop stewards to his office. They went there but stood outside of it. He emerged with copies of the ultimatum which he handed to them. Just then Mr. Shezi arrived. He had been called by Mr. Nxumalo. Mr. Fischer asked who he was. Mr. Shezi told him that he was an Organiser from Numsa but Mr. Fischer slammed the office door to his face. Mr. Fischer then gave an instruction that the security guards were to close the security gates as he did not require anybody in the premises, saying he was going to call for more security guards to shoot us and not the SAPS who were our friends. As the gates were being closed Mr. Shezi and the shop stewards just managed to hurriedly squeeze themselves out. It was not possible for Mr. Shezi to convince workers to return to work. He had seen how Mr. Fischer treated him and how the gates were closed even for him. He then told workers to report the matter to the bargaining council.
- [29] At about 12h00 Mr. Fischer came out of the premises to the strikers and told them that their work had been terminated. Workers remained gathered at the gate. At about 14h00 Mr. Fischer came to them again and gave Mr. Zuma their pay slips, saying he would put money into their respective bank accounts. He told Mr. Zuma to convey to the night shift that they were only to report for work on the next morning, on Tuesday, instead of that Monday night. On Tuesday everybody came to report for work. The gates were locked and they could not get inside. At about 09h00 Mr. Fischer came out with pay slips for the night shift and distributed them. The night shift was also dismissed. No disciplinary hearings were conducted before their dismissals.
- [30] There was a suggestion that the applicants' case had four versions, covered in the statement of case, in the affidavits taken by the previous attorney and filed, a version put to respondent's witnesses and what Mr. Nxumalo had testified to. He

said that there could have been differences in the times given for events but conceded that not all events were included in all the encounters. That Mr. Fischer said he would call the armed guards who would shoot the workers was not included in all encounters. The time of the arrival of the armed guards, when seen against the arrival of Mr. Shezi, was not the same in the encounters. So too was the declaration of a dismissal, which was also said to have been made when the door was slammed on Mr. Shezi's face when he had said that it was said at about 12h00 outside of the company premises. In the statement of case and in the affidavits it was stated that Mr. Shezi and the shop stewards had attempted to convince workers to return to work and that the impediment was with the locked gates. That went against his evidence that Mr. Shezi could not convince workers to return to work. The messing up of the country by leaders and that Mr. Fischer came to the gate at about 12h00 are events that were also not included in his affidavit. Mr. Nxumalo conceded that he confused some of the events in relation to what had happened. He maintained that workers could not return to work when the gates were locked, there were armed security guards and Mr. Fischer was refusing to talk to them. Mr. Niehouse appearing for the applicants conceded that it had not been disputed that Mr. Fischer arrived at 07h30 on Monday morning.

- [31] According to Mr. Nxumalo, Mr. Fischer had not just given the workers an option of what to do but he had threatened them. To a suggestion that the grievances of the workers could have been resolved without a strike, Mr. Nxumalo could not agree with it, saying that a meeting had been requested and granted for the discussion of the issues but Mr. Fischer refused to discuss. Nor could he agree that workers always wanted to strike. Instead it was the treatment meted out to the workers and their union representative which made them find difficulty in returning to work. He said that all dismissed employees, including those that could not attend court, wanted to be reinstated.

**Submissions by the parties.****Submissions by the respondent**

[32] There are a vast number of differences between the evidence given by the respondent's witnesses and the applicants' witness. The respondent contends that it is not necessary to enquire into the merits of each separate factual dispute because the evidence of the applicants' witness is so unreliable that it should be rejected completely where it differs from the evidence of the respondent's witnesses. The respondent contends that the evidence of the applicants witness Mr. Nxumalo is unreliable for the following reasons:

1. The witness admits having deposed to an affidavit about the matter on 16 September 2009. There are substantial and material differences between the witness's oral testimony and that deposed to in the affidavit on every significant aspect;
2. Although Mr. Nxumalo gave evidence that the affidavit was prepared by a third party and that the third party failed to accurately record much of what the witness had told to him, he was not (particularly under cross-examination on 18 March) prepared to reject the testimony contained in his affidavit, and hedged his bets with regard to which version was correct;
3. Mr. Nxumalo was extremely evasive, tried to avoid the substance of most questions put to him in cross-examination and was frustratingly unwilling to make concessions or give his evidence candidly;
4. He admitted to being confused about the sequence of events (when he eventually conceded that what he had said orally about

the timing of the arrival of armed guards in his oral evidence differed from what he had said about the timing in his affidavit);

5. A number of averments were made in oral evidence for the first time and the only reasonable inference that can be drawn from this is that Mr. Nxumalo was adding in and embellishing the applicants' version, in particular:
  - a. in his oral evidence, he claimed that Mr. Fischer had threatened on two separate occasions to call in guards who would shoot the workers, whereas this was not mentioned at all in the affidavit or in the applicants' statement of claim;
  - b. he claimed that Mr. Fischer had made vulgar and disparaging remarks about the state of the country and its leaders in oral evidence, whereas this was not mentioned in the witness's affidavit or the applicants' statement of claim;
- 6 The differences between the applicants' pleaded case (or for that matter, the witness's affidavit) are so material, and there are so many of them, that they give rise to the inescapable inference that the draughtsperson was instructed with a substantially different version from that presented by Mr. Nxumalo;
- 7 The applicants have failed to call any witnesses to corroborate the evidence of its single witness, when some such witnesses were present at court and clearly available;
- 8 The evidence of the first applicant's representative, Mr Shezi, was not led, despite the contents of Mr. Shezi's letter

appearing to be significantly different from the oral evidence of Mr. Nxumalo.

[33] It is accepted that the oral evidence of the respondent's witnesses was unsatisfactory in minor respects, for example:

- the versions of Messrs Fischer and Ramadu differ as to the time at which the first meeting was held on 21 April 2008;
- there are differences of detail between the respondent's pleaded version and the oral evidence given by Mr. Fischer; and
- during cross-examination Mr. Fisher attempted to retract from his statement that he had slammed the door on Mr. Shezi.

[34] It is submitted that none of the afore going detract from the essential veracity and reliability of the evidence given by the respondent's witnesses, but are rather of the sorts of inaccuracies or lapses in memory to be expected from witnesses giving candid evidence. It is submitted that the result is that the issue of whether the dismissal was unfair must be decided on the factual version as presented by the respondent's witnesses. Even if the respondent's submissions with regard to the facts pertaining to the unfair dismissal claim are accepted, the respondent must accept that the authorities which deal with similar dismissals are against it, particularly in that the authorities envisage the holding of (at least) a hearing after the expiration of an ultimatum to establish whether employees were to blame for not complying with the ultimatum.

[35] The respondent submits, however, that the facts show that this was an instance in which no purpose would have been served in holding a hearing in that the applicants were intent on maintaining the unprotected strike. Reasonableness

must be assessed according to the interests of both the employer and the strikers, and that where strikers engage in an unprotected strike with no intention to return to work, what would in other circumstances be considered reasonable obligations of an employer should be relaxed. If the above submissions of the respondent are accepted, then the dismissal was fair and the claim should be dismissed with costs.

[36] If the respondent's submissions are not accepted, and it is held that the applicants were unfairly dismissed, then it is submitted that the consequences of the unfair dismissal fall to be considered. Although it was recorded that the applicants did not agree with the evidence of Fischer pertaining to the financial state of the respondent, his evidence was not challenged in cross-examination and no contrary evidence was led. There is accordingly no basis for rejecting any of Mr. Fischer's evidence in this regard. He said that:

- that the respondent is unable to afford the cost of the reinstatement claimed by the applicants;
- if the full relief sought by the applicants is granted, the respondent will have to be wound up;
- the respondent has employed workers in permanent capacities to fill the vacancies caused by the dismissal of the applicants, and is not in a position to reinstate or re-employ the applicants;
- the business of the respondent operates at a fixed minimum cost and is profitable only if a certain tonnage of work is achieved. In recent months, due to the downturn of the economy, the completion of the FIFA World Cup works etc. the monthly tonnage previously achieved by the respondent has been halved, and the respondent made a loss in December and January.

[37] The applicants were at least partly to blame for the situation in that they could have obtained adequate redress for all their grievances without engaging in an unprotected strike. The applicants did not need to engage in an unprotected

strike in order to obtain redress of their grievances, in fact it is conceded that the grievance pertaining to the dismissal of two contract workers has been resolved in the Bargaining Council. It will serve no purpose, and be of no benefit to the applicants (or the respondent's other employees) to make an order reinstating the applicants if this will simply have the effect of forcing the respondent into insolvency. It will not benefit the applicants to make an award which bankrupts the respondent as, although they may be preferential creditors in a winding up, the proceeds of the liquidation of the respondent are likely to result in an insignificant award being paid to the applicants, and even then only after a delay while the liquidation takes place.

- [38] In all the circumstances it is submitted that compensation rather than reinstatement is a more appropriate remedy in the circumstances than reinstatement or re-employment. Because of the applicants' conduct it is submitted that compensation should not be awarded for the maximum period limited by the Act but should be for no more than the equivalent of two months remuneration in the case of day shift workers and three months remuneration in the case of night shift workers.

**Applicants' submissions.**

- [39] The applicants contend that their dismissals were both substantively and procedurally unfair, despite the fact that it is conceded that the industrial action embarked upon by some of the applicants, was indeed unprotected. In this regard the applicants contend that on a proper and holistic consideration of all facts and circumstances pertaining to the relevant events, their conduct was justified and reasonable, whilst the respondent's conduct was unlawful, grossly unreasonable and provocative.
- [40] The attempt of the respondent to argue in its heads that Court should decide the matter on the basis of the respondent's version (in that the testimony of Mr. Nxumalo was allegedly inadequate), self-evidently has no substance and

constitutes a rather desperate and futile attempt to salvage what was quite simply a hopeless case presented by the respondent.

[41] The aforesaid attempt also fails to take into account the following:

- That the dismissals in question were indeed grossly unfair is in fact apparent from the respondent's own version of events and concessions made by its witnesses during the course of the trial.
- Mr. Nxumalo's testimony was, despite certain shortcomings, by no means of such poor quality that it can be seriously suggested that it ought to be dismissed in its entirety.
- In this regard, unlike what the respondent now, with respect, opportunistically argues, those shortcomings were not indicative of Mr. Nxumalo having been untruthful or evasive, but it rather resulted from:-
  - The fact that Mr. Nxumalo had refused to make concessions sought where such concessions were simply not warranted;
  - In a few instances, there existed genuine communication problems during the trial;
  - Mr. Nxumalo was furthermore placed in the untenable position where he was required to answer for the shortcomings in the manner in which the applicants previous legal representative had handled the matter. That there were indeed such serious shortcomings ought to be apparent from the fact that Mr. Nxumalo's statement appears to have been commissioned in Bruma, Johannesburg (where the offices of the

applicants' previous attorney is located) whilst Mr. Nxumalo (and the others) self-evidently signed the affidavit in Durban.

- Although the applicants respect Court's position to the effect that no negative inference will be made from the respondent's refusal to file witness statements, it is respectfully pointed out that it is patently unfair and quite ironic that whilst the respondent refused to file such statements its entire case now comprises of an attempt to capitalise on discrepancies between Mr. Nxumalo's statement and his verbal testimony. Although it is accepted that the respondent will by no means be prejudiced as a result of its refusal to file witness statements, it is respectfully submitted that it will be quite an injustice should the respondent now be permitted to take undue advantage of this.

[42] It is of course so that parties are bound by the content of the pleadings. Caution must be had against pleadings being approached in an overly technical and formalistic way. *In casu*, the applicants' statement of case incorrectly reflects in paragraph 14 thereof that whilst a meeting was taking place with Mr. Fischer on 21 April 2008, the remainder of the workforce embarked upon strike whilst awaiting the outcome of the meeting. That this statement is indeed patently incorrect was emphatically confirmed, not only by Mr. Nxumalo testifying for the applicants, but also by Mr. Ramadu testifying for the respondent. It will be patently absurd and it cannot serve the interests of justice if Court should ignore the clear and unambiguous common cause evidence to the effect that the strike had in fact not commenced before but only after the meeting, and instead have regard, in an entirely artificial manner to the patently incorrect statement in the pleadings.

[43] Justice requires that Court will have proper regard to the clear evidence of Ramadu to the effect that:

- Although he denied having specifically told the workers to wait in the change room to get a report back of the outcome of the meeting, he specifically agreed and conceded during cross-examination that this (i.e. that the remainder of the workforce would wait in the change room to be advised about the outcome of the meeting) was clearly the common understanding between the parties at the time;
- Mr. Ramadu further testified that Mr. Fischer had in fact told the shop stewards to report back to the workers after the meeting and to revert to him. Although this was not quite correct, the fact of the matter is that his understanding of the situation clearly reinforced the fact that the workers were awaiting a report back and that they were not on strike; and
- Mr. Ramadu emphatically confirmed that the strike only commenced after the report back was given to the workers and at the time when they left the premises; and
- In addition Mr. Ramadu confirmed that - unlike Mr. Fischer's testimony based upon (alleged) hearsay information received from Mr. Ramadu - there were not on Friday or Monday (prior to the meeting) any threats whatsoever relevant to industrial action.

[44] It will be most unfortunate and with respect, contrary to the interests of justice, if this evidence should be ignored in an artificial and overly technical manner on the basis of an incorrect statement in the pleadings. Self-evidently a proper consideration of the evidence cannot but result in the conclusion that the entire

strike was triggered by the conduct and approach of Mr. Fischer to the meeting held with the worker representatives.

[45] Nevertheless, as much as the respondent now attempts to capitalise on this error in the pleadings (whilst its own pleadings also not only contain errors, but indeed blatant untruths), whether or not Court will hold the applicants to this incorrect statement does not derogate from the fact that even if it is found that the strike had indeed commenced whilst or immediately before the meeting took place, the grossly unacceptable and inappropriate conduct of Mr. Fischer during the said meeting at the very least then aggravated the situation and/or prolonged the continuation of the strike.

[46] In this regard Mr. Fischer is on record that:

- The statement contained in paragraph 13 of the respondent's reply to the effect that the representatives were advised that their concerns would be investigated and discussed but in the interim the shift had to return to work, is quite simply entirely false.
- On the contrary, instead of addressing the concerns of the workers by way of process or otherwise, Mr. Fischer adopted the attitude that *"there was nothing to discuss"*.
- In this regard Mr. Fischer made his approach to labour relations issues quite clear during his testimony: *"I pay, you work"*.
- Although the applicants did state that the meeting was ended by Mr. Fischer on the basis of advising the delegation to tell the workforce that they must either work or leave the premises, it is most significant that Mr. Fischer in his evidence in chief in fact stated that:

*"I decided they should leave the premises."*

and

*“I cannot remember whether I said ‘get out of the factory’ or ‘leave the premises’.”*

- [47] What is apparent and important from the aforesaid is that Mr. Fischer had clearly conveyed to the workers his desire that they should leave the workplace. As such it is not now open for the respondent to attempt to place emphasis (as it did during cross-examination of Mr. Nxumalo) on the fact that the applicants conceded that attached to this instruction to leave the premises was also a statement that those who wanted to work could do so. Not only was this not Mr. Fischer’s version, but when the entire statement is viewed in context and objectively (based upon Mr. Fischer’s own version), he conveyed to the workforce a clear and unambiguous message that he wanted them out.
- [48] It is of course then also very significant that (despite Mr. Fischer’s attempts to present testimony to the contrary), Mr. Ramadu confirmed that the objective reality was that prior to the strike the respondent’s workforce essentially comprised of permanent workers and subsequent to the strike the entire (new) workforce was employed based upon fixed-term contracts. Self-evidently Mr. Fischer provoked the strike in order to attain his objective of dismissing his permanent workforce and replacing them with contract workers who presented to him less of a financial and other perceived burden.
- [49] It is of course also an indisputable fact that unlike Mr. Fischer’s view at the time (and which view was persisted with during the trial), that there was *“nothing to discuss”* relevant to the termination of the services of the fixed-term contract employees, the dismissal of these employees was unfair and so much had been confirmed during subsequent arbitration proceedings. Likewise the respondent’s utilisation of fixed-term contracts constituted a contravention of the Industry Main Agreement. As such irrespective of whether or not the strike had commenced just before or just after the meeting, the objective reality is that the strike action was premised upon or occurred against the background of:

- Unlawful and unfair conduct of the respondent relevant to the utilisation of fixed-term contracts; and
- The grossly unfair (and indeed irresponsible) attitude of Mr. Fischer during the meeting with the worker representatives on 21 April 2008, that there was nothing to discuss.

[50] Self-evidently the strike in question was on this basis justifiable conduct in response to the employer's unjustifiable conduct. That unjustifiable conduct of the respondent of course went much further. In this regard the applicants allege that during the course of the meeting Mr. Fischer conducted himself in a most inappropriate manner relevant to what he had stated and his attitude in general. Mr. Fischer either denies that he had said what is alleged or he maintains he had stated same in a different context. However, what has been clearly established during the hearing is that:

- The version contained in the respondent's response at par 15 to the effect that Mr. Fischer did not threaten to employ Phoenix Galvanizing employees, is simply false. In this regard Mr. Fischer's own letter (p5 of the applicants' bundle contains the exact same threat).
- The statements contained in the said letter relevant to the threatened closing down of the business; Mr. Fischer's possible relocation to Britain; etc are entirely consistent with what the Applicants allege Fischer had said during the meeting.
- Mr. Fischer's own testimony relevant to having been tired of labour problems; his views in general on labour relations (he pays, they must work); and "*these people*" and what "*these people*" are capable of doing, is entirely consistent with what the applicants allege he had said during the meeting.

[51] In the circumstances it is submitted that based upon the probabilities, Court ought to find that Mr. Fischer had indeed conducted himself during the meeting in a manner calculated to:

- evince his superiority and power towards the workers;
- ridicule the financially weak and powerless positions of the workers;
- convey in a spiteful and grossly insensitive manner that he had, as a result of his money, power and dual citizenship many options, whilst the workers had no options;
- made derogatory comments relevant to political leaders and the country as a whole.

[52] As a result of that conduct and the refusal to discuss the legitimate workplace issues with the worker representatives the workers left the respondent's premises thereby –

- commencing strike action in response to the respondent's provocative conduct;
- alternatively, and only to the extent that Court may find that the strike had commenced prior to the end of the meeting with Mr. Fischer, then it is submitted that Mr. Fischer's conduct had resulted in the escalation of the strike from a sit-down in the change room to a walk-out from the premises.

[53] Once the workers left the premises (as effectively ordered by Mr. Fischer) he took no positive steps towards defusing the situation and convincing the workers to return to the workplace. On the contrary, his conduct was clearly aimed

towards effecting the final dismissals of the workers. This was apparent from the following:

- Despite the fact that the workers voluntary (albeit on instructions of Fischer) left the premises and despite the fact that there was no indication of violence, Mr. Fischer immediately had the gates closed/locked and he deployed armed guards. There was no justification whatsoever for this conduct.
- Without any further engagement (as inter alia required by law and simple considerations of fairness) resort was had to the issuing of an ultimatum, clearly on the basis that Mr. Fischer was made to believe that this was a necessary procedural step to comply with prior to implementing the desired outcome – i.e. dismissal of the workforce.

[54] Against the aforesaid background and contrary to the respondent's obligations in terms of the Act, Mr. Fischer not only failed to contact the union prior to the issuing of the ultimatum, but when Mr. Shezi arrived at the workplace Mr. Fischer conducted himself in the following manner:

- In a patently rude and aggressive manner he asked Mr. Shezi what he wanted;
- Without affording Mr. Shezi an opportunity to respond Mr. Fischer told him to go and counsel his "workers" and then slammed the door in his face in that Mr. Fischer was "upset".
- Despite the fact that this incident was specifically denied in the respondent's papers, Mr. Fischer of course conceded in evidence in chief that he had conducted himself as such and in a most

unimpressive manner he tried to backtrack from this concession during cross-examination.

- [55] From cross-examination it appeared that the respondent intended to argue that it would not have made any difference had Mr. Shezi been contacted and had Mr. Fischer properly engaged him. A similar sentiment is then also contained in its heads. Had the respondent engaged with the union in a proper manner before issuing of the ultimatum, it could have been educated and persuaded that its conduct relevant to the utilisation of fixed-term contracts and dismissal of employees were unlawful and unfair.
- [56] Likewise, had the respondent engaged with the union in a proper manner before issuing of the ultimatum it could have been educated and persuaded that its conduct relevant to the utilisation of fixed-term contracts and dismissal of employees were unlawful and unfair. Likewise no hearings were held before or after dismissal. The respondent self-evidently acted in a procedurally unfair manner, especially in circumstances where Mr. Fischer claimed that certain workers were in fact intimidated and prevented from returning to work. Had this been the case, the opportunity should have been afforded to those so intimidated to have presented same as a defence. It should also be apparent that the respondent's dismissal of the nightshift employees was quite simply premature and grossly unfair. Mr. Fischer is on record that these employees were off duty and as such not on strike. He conceded that they "*drifted away*" during the course of the day. Yet, at 14h00 he instructed in an entirely dissatisfactory manner that their 18h00 shift had been cancelled and that they had to report for the next morning's dayshift, he then proceeded to dismiss them when they did not (according to him) report for dayshift.
- [57] Not only was this unilateral change of a shift unacceptable (especially in the context of a volatile strike situation), but clearly the communication channels were inadequate and the evidence clearly indicated that there were persons who

reported for duty and there were instances where security guards refused to permit entry.

- [58] There can be no question that the dismissals were indeed grossly unfair both procedurally and substantively. The respondent's defending of the applicants' unfair dismissal claim was in fact frivolous and vexatious justifying a special cost order. The applicants seek reinstatement and given the provisions of the Act there is no reason why this should not be granted. The submissions of the respondent relevant to the appropriate relief are of no substance. Should the respondent's contentions relevant to financial hardship be true (and this is by no means conceded) it has other remedies and Court should not now be burdened with such issues.

### **Evaluation**

- [59] The dismissal of all the employees in this matter has been unchallenged and in fact conceded to by the respondent. The respondent had then to show that it had a fair reason as a result of which it dismissed its employees and that it acted with fairness in carrying out such a dismissal. It was also common cause that the employees embarked in an unprotected strike when they left the change room and proceeded to gather outside of the company's premises. There remains a live dispute of facts whether the employees had commenced with an unprotected strike as they gathered and waited in the change room. This has a bearing on whether Mr. Fischer provoked the strike or made an already bad situation worse.
- [60] Item 6 of Schedule 8 of the Code of Good Practice: Dismissal provides *inter alia* that:

“6      *Dismissals and industrial action*

(1) *Participation in a strike that does not comply with the provisions of Chapter IV is misconduct. However, like any other act of*

*misconduct, it does not always deserve dismissal. The substantive fairness of dismissal in these circumstances must be determined in the light of the facts of the case, including-*

- (a) the seriousness of the contravention of this Act;*
- (b) attempts made to comply with this Act; and*
- (c) whether or not the strike was in response to unjustified conduct by the employer.*

*(2) Prior to dismissal the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt. The employer should issue an ultimatum in clear and unambiguous terms that should state what is required of the employees and what sanction will be imposed if they do not comply with the ultimatum. The employees should be allowed sufficient time to reflect on the ultimatum and respond to it, either by complying with it or rejecting it. If the employer cannot reasonably be expected to extend these steps to the employees in question, the employer may dispense with them."*

[61] Grogan, Workplace Law, 10<sup>th</sup> Edition from page 401, states *inter Alia* that:

*"The Act enjoins the courts to consider whether the strike itself was a response to unjustified conduct. This consideration may also be relevant to whether the continuation of the strike was justified."*

*"Unjustified conduct' by an employer may excuse unprocedural strike action by its employees. In this context, the word 'unjustified' is not restricted to illegal conduct—any unfair conduct may justify a strike that does not comply with the Act. The strike is then generally*

*considered justified by necessity or self-defence, which purges the workers' action of its illegality."*

*"Dismissed strikers have often been granted relief solely on the strength of the employer's refusal or failure to bargain at all or in good faith. To this extent, the labour courts' jurisprudence on bad-faith bargaining conduct remains largely relevant under the new LRA."*

- [62] In the case of *Modise & Others v Steve's Spar Blackheath* (2000) 21 ILJ 519 (LAC) court held that consultation with the union serves the function of a pre-dismissal hearing. According to Grogan: *"A mere notice to the union that the employer intends to issue an ultimatum will on this view be insufficient. Some form of discussion must precede an ultimatum to the strikers."* In *National Union of Mineworkers & Others v Billard Contractors CC & Another* (2006) 27 ILJ 1686 (LC), it was held that unprotected strikers are in principle entitled to be heard twice before they are finally dismissed - firstly, before an ultimatum is issued, and again before, or perhaps after, they are or have been dismissed.
- [63] Section 68 (5) of the Act states that participation in a strike that does not comply with the provisions of this Chapter, or conduct in contemplation or in furtherance of that strike may constitute a fair reason for dismissal. In determining whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account.
- [64] As already indicated, the applicants have conceded to their act of misconduct when they left the change room and went to gather outside the company premises. They had then withdrawn their labour at a time when they were expected to return to work and then to comply with the Act, should they have wanted to strike. The ultimatum called on them to return to work before 12h00. The parties are in dispute about the time at which Mr. Fischer arrived at work on

21 April 2008 and therefore there is a dispute about when the meeting started. When taking the times given by the respondent, it was at about 08h30 to 09h00 that workers left the change room. So the strike lasted for about 08h30 to 12h00. These are hours of lost production during which the strike endured. To an extent the misconduct was serious. The employees made no attempts to comply with the Act.

[65] The next probe is whether or not the strike was in response to an unjustified conduct by the respondent. On his arrival at the work place, Mr. Fischer chose not to go to the change room where workers were waiting for him. Mr. Ramadu's evidence suggests as well that he expected Mr. Fischer to address the workers on his arrival. Mr. Fischer chose to speak to the employees' representatives. In Mr. Ramadu's evidence there were no negotiations in that meeting. Mr. Fischer spoke and just told the representatives to go to the change room to report to the rest of the employees. That was indeed the evidence of the applicants that Mr. Fischer did not give them a chance to speak.

[66] A failure to give the employees a chance to speak suggests, in the context of this case, that he was not in a good mood. That suggestion is strengthened by the evidence of the applicants. He knew that the employees' representatives he had called had issues to discuss with him. They are the ones who had called for the meeting. As it later turned out the grievance of the employees was found to have been legitimate. He denied that he had refused to discuss any grievances with the employees' representatives. Yet it turned out that no discussions of the grievances took place. He admitted in court having told them that he was contemplating closing the company and going abroad to retirement. He admitted having made a reference to the other competitive company closing down. He admitted having made reference to one of the shop stewards having to go and open his business. When all these factors and, as admitted by Mr. Ramadu, no discussion between the representatives and Mr. Fischer took place, a conclusion

is irresistible that Mr. Fischer was in a foul mood and brook no opposition in what he was saying.

- [67] When Mr. Shezi came and introduced himself as an Organiser from Numsa, Mr. Fischer slammed the door on his face. This was the same person that had diffused a similar incident at this company some three years before. When testifying, Mr. Fischer attempted to down play this incidence until he recapitulated to effective cross- examination. It was never suggested that he was in the habit of slamming doors on the faces of other people so that this incident could fade out of his mind easily, as one of many such regular occurrences. Simply put, he lied about it thus making his evidence suspect.
- [68] On Mr. Shezi's arrival Mr. Fischer was already issuing an ultimatum. He had not contacted the union so as to try and diffuse the situation. It remained undisputed that the shop stewards and Mr. Shezi left the company premises hurriedly and squeezed themselves out of the gate that was in the process of locking them in. Clearly, Mr. Fischer treated the union official and the shop steward with contempt. They could no longer be objective in assessing the situation and in having to try to normalise it. The conduct of Mr. Fischer on this day is akin to pouring petrol into a smouldering fire. When he issued the ultimatum, he was just going through the motions, after he was given an advice. He could not even explain the relevance of giving the employees the two hours, except doing as advised. The evidence that the strike was in response to an unjustified conduct by the employer, Mr. Fischer is overwhelming in this matter. It is even surprising that there was only minimal damage associated with the strike.
- [69] I return to the issue of whether the strike commenced when the employees were gathered in the change room. On the arrival of Mr. Fischer at the premises, he could have chosen to go to the change room to meet the employees. He said he chose not to follow that route as he would be confronted by a group of people. He could have chosen to go and speak to them in the change room. If he had

done so, it could not be that the strike had then commenced. The holding of meetings by members of management to resolve workplace issues is to be hailed. Mr. Ramadu spoke to the same group at the instance of Mr. Fischer as he came to ask for employees that would represent the workforce. There is no evidence of him having had any problems. Mr. Ramadu conceded that there was an understanding that after the meeting with Mr. Fischer a report back would be given to workers. Hence the presence of the nightshift employees. Mr. Fischer would have known that the entire workforce was gathered at the change room. He said nothing about the gathering. In fact he is the one who sent the representatives to go and tell the employees to resume work or leave the premises.

[70] According to Mr. Ntiyantiya the strike commenced when employees left the change room. Before that the workers had not given him, as security guard on duty at the time, any reason to think that they were on a strike. Paragraph 14 of the statement of case states that, whilst a meeting was taking place with Mr. Fischer, the remainder of the work force embarked upon a strike. From the foregone it must follow that this statement is untrue. The overwhelming evidence points towards the strike having commenced soon after the shop stewards reported back what was told to them by Mr. Fischer. Embarking on a strike was clearly an emotional reaction to what was said by Mr. Fischer. Mr. Fischer was not justified to treat the temporary employees as he did.

[71] I now have to consider the issue whether or not the employees wanted to resume work as they gathered outside the company premises. Mr. Nxumalo was not candid with the truth in this respect. He could not withstand persistent effective cross-examination. He created a clear case of antagonism between his group and Mr. Fischer having reached such a high degree that the representatives could no longer convince striking workers to return to work. He made an obvious attempt to cover up when he was confronted with an earlier made statement that workers were convinced to return to work but could not because of the locked

gates. He lied in this regard. If they wanted to return to work, they could very easily have telephoned Mr. Ramadu, with whom they had effective communication. They could also have told the guards who no doubt would ferry the message to management. The ultimatum gave them until 12h00 and at around that time Mr. Fischer came out to them. They could very easily have gone back to work, if they wanted.

[72] I conclude by holding that the unprotected strike embarked upon by the employees of the respondent on 21 and 22 April 2008 was provoked by and was in response to an unjustified conduct by Mr. Fischer, the employer. Their dismissal was consequently substantively unfair. Further it was not carried out in a fair manner.

[73] The basic remedy in terms of section 193 of the Act is to reinstate all the employees. They have asked for that relief. Against that is the evidence of the respondent that reinstatement will bankrupt the respondent which would have to be liquidated. The ability of the employer to reinstate is an important consideration together with the interest of the employees. I entertain no doubt that an unfairly dismissed employee is likely to face a ruined life, in a country where finding a job is very challenging. It has been more than two years now since the employees were dismissed. About 27 months of back pay would be involved, if reinstatement is ordered. In my view, the conduct of the respondent was highly reprehensible in the circumstances that it should be unfair to allow it to benefit from that conduct. There should be another way of ameliorating the situation so as to accommodate both parties. In the same vein I have considered what an appropriate costs order should be.

[74] I proceed to make the following order:

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1. The respondent, Durban Galvanizing (Pty) Ltd, is ordered to reinstate all employees whose names appear in the schedule to the

bundle of pleadings in pages 41 and 42, with effect from their dismissal, with no loss of earnings.

2. At least one month back pay is to be made to each employee, in addition to the monthly salary he/she earns until the back pay is fully paid out.
  3. The second to further applicants are to report for duty at 07h00 on 2 August 2010.
  4. Interest will only be due as from 2 August 2010 and only in respect of an outstanding payment in term of this order.
  5. The respondent is ordered to pay the costs of this application.
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Cele J.

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